Supreme Court, U.S.
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No. 99-886

In The

Supreme Court of the United States

TOWN BOARD OF THE TOWN OF HEMPSTEAD, NEW YORK, *et al.*,

Petitioners,

v.

DOROTHY GOOSBY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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Respondents' brief in opposition does not contest, and thus effectively concedes, that the Section 2 issue presented here is critically important and must be resolved prior to the next redistricting cycle. Nevertheless, in a vain effort to shield the Second Circuit's ruling from review, respondents seek to recast the purely legal questions presented as factual issues and also attempt to obscure the sharp split among the circuits on this issue by distorting, or simply ignoring, those decisions that conflict with the decision below. As three other circuits have properly held, an at-large electoral system cannot violate Section 2 absent a finding of racially-biased voting and adverse findings concerning other "Senate Report factors," unrelated to voting, cannot substitute for that missing finding. Thus, even accepting every factual finding by the lower court as unquestionably true, the judgment below cannot be reconciled with the other circuits or this Court's precedent. This is why the civil rights *amici* supporting respondents below said the legal questions presented in this case are "important issues" and urged the Second Circuit "to reject the Fifth Circuit's interpretation of the third *Gingles* prong." *Amicus* Brief of NAACP Legal Defense Fund at 2; *Amicus* Brief of NAACP at 1.

1. The legal issue presented in this case is whether an at-large voting system may violate Section 2 absent any finding that nonminority voting is attributable to racial concerns, rather than traditional, color-blind partisan considerations. We established in the petition that the First, Fifth and Eleventh Circuits directly hold that a finding of such racially-biased voting is an essential prerequisite to a Section 2 violation, while the decision below rejected such a rule and found a violation absent any evidence, much less any finding, of racially-biased voting patterns. In a feeble effort to deny the existence of this fundamental split among the lower federal courts, respondents attempt to distort the factual and legal basis of the decision below and the legal principle established in the other circuits. Specifically, respondents seem to suggest that (1) the Second Circuit somehow *sub silentio* agreed with the legal principle that color-blind partisan voting cannot violate Section 2, but factually found that Hempstead voters are motivated by race, rather than partisanship and that (2) the other circuits do not

require any finding of racially-biased voting as a prerequisite to a Section 2 violation. Both assertions are obviously false and cannot disguise the decision below's stark departure from the other circuits' legal resolution of this central Section 2 issue.

First, there is no evidence, much less any finding, that voting patterns in Hempstead are explained by race, or anything other than normal partisan politics. To be sure, as respondents correctly note, the district court found that the "*political* processes *leading* to elections and the [Republican] *slating* of candidates for them are not equally open to the participation of blacks." Brief in Opposition ("Opp.") 22 n.19 (quoting Appendix to Petition ("App.") 129a-130a) (emphases added). But, as the petition explained at length, three other circuits require a finding of racially-biased *voting* by the electorate; a finding of racial bias in *slating*, or other aspects of the nomination or political process used by private political parties, plainly does not suffice. There is no such finding of racially-biased voting here, nor could there be because it is undisputed that black candidates receive the same support from the electorate as their white counterparts. Thus, even assuming black Republican candidates received less support in slating from the Republican Party than whites, Hempstead's at-large voting system would not violate Section 2 in the First, Fifth or Eleventh Circuits because black candidates receive the *same* support from the *electorate*. 42 U.S.C. § 1973. In those circuits, the court must find that "the *voting community* is driven by racial bias" and plaintiffs "cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites *voted* as a block for reasons wholly unrelated to racial animus." *Nipper v. Smith*, 39 F.3d 1494, 1547 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995), *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) (emphases added). But here plaintiffs did prevail even though it is undisputed that white voting was not "driven by racial bias," but by partisan concerns "unrelated to racial animus." The court below's legal error, then, is that it found a Section 2 violation even though the record *concededly* proved that "partisan affiliation, not race, best explains the divergent

voting patterns among minority and white citizens in the [jurisdiction]." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*) ("*LULAC*"), *cert. denied*, 510 U.S. 1071 (1994).

In short, the court below invalidated the at-large system without making the finding of a racially-motivated electorate that is an essential requirement to invalidate such systems in three other circuits. Respondents cannot disguise or alter this stark reality by continually changing the subject to the entirely different question of whether the Republican Party was equally open to minorities in its slating process.

In the same vein, respondents devote the bulk of their Opposition to establishing that the First, Fifth and Eleventh Circuits consider the existence of racially-biased voting as part of the ultimate Section 2 vote dilution inquiry, rather than as part of the third *Gingles* precondition of "white bloc voting," necessary to establish a *prima facie* case. This is neither true nor a ground for reconciling the decision below with the legal principle established in the other circuits. First, as the very quote cited by *respondents* establishes, the Fifth Circuit's *en banc* decision in *LULAC* plainly holds that "plaintiffs have failed to establish racial bloc voting" – *i.e.*, the "third prerequisite of *Gingles*" – if "voting patterns among white and minority voters are best explained by partisan affiliation." Opp. 27 (quoting *LULAC*, 999 F.2d at 861). *See also* 999 F.2d at 892. This holding was repeated countless times in the *LULAC* opinion, as both the *LULAC* dissenting opinion and subsequent lower federal court decisions have expressly recognized.[1]

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[1] *See, e.g.*, 999 F.2d at 877 ("This is a failure to meet the threshold showing required by *Gingles*."); *id.* at 879 ("[T]he minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations. We are not persuaded that this is racial bloc voting as required by *Gingles*."); *id.* at 892 ("The plaintiffs have not established the third prerequisite of *Gingles*."); *id.* ("Therefore, plaintiffs have not met the third *Gingles* factor."); *id.* at 893 ("Plaintiffs have failed to meet the third prerequisite of *Gingles*."). *See also* 999 F.2d at 902 (King, J., dissenting) ("[T]he majority holds that to establish legally

Thus, the Fifth Circuit clearly holds that divergent voting patterns attributable to partisan affiliation do not constitute the "legally significant racial bloc voting" that plaintiffs must establish as a *Gingles* precondition.

Respondents point out that the *LULAC* court, like all conscientious appellate courts, looked at the "record" and said that the issue of racially-biased voting should "rest 'upon a searching practical evaluation of the past and present reality.' " Opp. 26-27 (quoting *LULAC*, 999 F.2d at 860, 861). While this is quite true, if the "searching" inquiry reveals that partisanship, rather than race, is the cause of divergent voting patterns, then plaintiffs' claim must be rejected because they have failed to establish the third prerequisite under *Gingles*. In the Second Circuit, in contrast, even if partisanship is *conceded* to cause divergent voting patterns, plaintiffs nevertheless have established the third *Gingles* precondition and the at-large system will nevertheless be invalidated if minorities are disproportionately members of the less-popular political party.

In short, the decision below cannot be reconciled with *LULAC* because the Second Circuit held that "the cause of white bloc voting is not relevant to a consideration of the *Gingles* preconditions." App. 30a. It also cannot be reconciled with the decisions of the First and Eleventh Circuits because those circuits also require a finding of racially-biased voting to invalidate at-large electoral schemes. The only difference is that they do not require that finding as part of the *Gingles prima facie* case, but only when the defendant alleges that partisan or other nonracial factors cause divergent voting patterns. Petition ("Pet.") 16-17. As established in the petition, and as respondents do not contest, the court below did not require a finding of such racially-biased voting, but expressly held that "neither the existence (or non-existence) of racial bias

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significant white bloc voting and racially polarized voting, minority plaintiffs must, at the very least, negate partisan politics as an explanatory factor for the consistent defeat of their preferred candidates."); *Clarke v. City of Cincinnati*, 40 F.3d 807, 813 n.2 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Lewis v. Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997).

in the community nor the strength of the correlation between partisan politics and divergent voting patterns can be dispositive in a Section 2 case." App. 124a. Rather, the court below relegated the issue of whether the electorate is color-blind to be merely one factor to be somehow considered in determining whether a Section 2 violation exists.

2. The petition explains at length that, absent race-conscious voting by nonminorities, an at-large system that fails to elect minority-preferred candidates does not "result" in discrimination "on account of race" or provide minority voters or candidates with "less opportunity" than similarly situated nonminorities. 42 U.S.C. § 1973. The petition further explains that interpreting Section 2 to require racially-drawn black majority districts absent such race-conscious voting violates equal protection rights recognized in *Shaw v. Reno*, 509 U.S. 630 (1993), and similar cases. Respondents provide absolutely no response to this constitutional argument and make no attempt to square the decision below with Section 2's language or legislative history, thus effectively conceding that their interpretation of Section 2 impermissibly requires rough proportional representation and, at a minimum, raises serious equal protection concerns. *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring).

In the face of this, however, respondents nonetheless maintain that the *Gingles* Court held that "racial bloc voting" and "vote dilution" analysis under Section 2 draws no distinction between an electorate that affirmatively discriminates against minority candidates because of their race and a color-blind electorate where all candidates are judged without regard to their race. In either instance, the at-large system "dilutes" minority voting strength if minorities have less electoral success than they would under a single-member districting scheme, without regard to what *causes* their relative lack of success. Opp. 23. While it is true that the *Gingles plurality* opinion seemed to endorse this method of "racial bloc voting" analysis, we previously established that Justice White expressly rejected it and Justice O'Connor (for herself and three other Justices) expressly concurred with Justice White's analysis. Pet. 22-23; 478 U.S. at 83 (White, J., concurring); *id.*

at 100 (O'Connor, J., concurring). Again, as is their wont, respondents simply ignore this dispositive point.

More generally, there is simply no basis for contending that Justice O'Connor's concurrence endorsed the Brennan plurality's view of "minority vote dilution" or "legally significant racial bloc voting." To the contrary, the concurring opinion expressly rejected Justice Brennan's "definition of minority voting strength and its test for vote dilution" precisely because it "results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups." 478 U.S. at 85 (O'Connor, J., concurring). *See id.* at 97. Indeed, Justice O'Connor's concurrence specifically criticized Justice Brennan's opinion because it *equated* "legally significant bloc voting by the racial majority" with "the extent of the racial minority's electoral success." *Id.* at 92. Under this definition, the concurrence noted, there will *always* be "legally significant white bloc voting" any time minorities do not have proportional representation or, more precisely, representation equivalent to that which they would achieve in a single-member districting scheme:

> If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

Id. This is unacceptable because this "test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." *Id.* at 94.

Like the *Gingles* plurality, the court below would similarly find "white bloc voting" and "vote dilution" any time a cohesive, geographically compact minority group would have more representation in a single-member scheme than it has achieved in an at-large system – even if its at-large losses are attributable to normal partisan politics that equally affect candidates

and voters of all races. As both *Gingles* concurrences pointed out, any such definition of "white bloc voting" is unacceptable because, contrary to *Whitcomb* and the language of Section 2, it would preferentially immunize minority voters from normal political vicissitudes and guarantee them proportional representation, rather than an opportunity equal to similarly situated nonminorities. 478 U.S. at 83 (White, J., concurring); 478 U.S. at 93, 98 (O'Connor, J., concurring). Under *Whitcomb*, however, it is not enough to find that minorities are "losing elections," the Court must find that there is a "built-in bias against . . . Negroes." *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). *See also Shaw*, 509 U.S. at 661 (White, J., dissenting) (*Whitcomb* and *White v. Regester*, 412 U.S. 755 (1973) require "discrimination in the polity," not "mere suffering at the polls."). Thus, both *Gingles* concurrences require courts to analyze the *reasons* for the failure of minority supported candidates, in order to determine whether it reflects a built-in bias facilitated by the at-large system, or simply the nondiscriminatory operation of the normal democratic process.[2] 478 U.S. at

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[2] To be sure, Justice O'Connor's concurring opinion was not precise about *when* Section 2 courts should analyze the causes of divergent voting patterns within the "racial bloc voting" litigation framework established by Justice Brennan's opinion. (This is hardly surprising since the concurring opinion rejected as unsound the basic thrust of Justice Brennan's vote dilution and racial bloc voting analysis.) As pointed out in the petition, this ambiguity has been noted by lower courts and led to disagreement about whether nonracial explanations for divergent voting patterns should be analyzed as part of the *Gingles* preconditions or as part of the "overall vote dilution inquiry." *Gingles*, 478 U.S. at 101 (O'Connor, J., concurring); Pet. 17. Resolving this confusion is an additional reason for granting the petition but, contrary to respondents' suggestion, hardly lends support to the court below's determination that a Section 2 violation may be found without *ever* engaging in this "*vote* dilution inquiry." Again, at some point, the court must determine whether the minority "community's lack of success at the polls was the result of partisan politics, [or] racial vote dilution." *City of Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting). Even assuming *arguendo* that this causation inquiry may be done after the *prima facie* case is established, the court below erred by finding that the at-large system somehow caused "racial vote dilution"

83 (White, J., concurring); 478 U.S. at 100 (O'Connor, J., concurring).

Moreover, under normal English usage, *Gingles*' discussion of "white bloc voting" cannot plausibly encompass *partisan* bloc voting where one overwhelmingly white group defeats another overwhelmingly white group for wholly nonracial reasons. In Hempstead, for example, the purported "white bloc voting" consists of a 96% white group (Republicans) defeating an 89% white group (Democrats). It is simply not reasonable to label such standard partisan competition between two overwhelmingly white groups as "white bloc voting" against "minorities" where, as here, minority candidates are not subject to some disadvantage different than white colleagues of the same party.

In addition, equating minority *partisan* defeats with impermissible vote dilution creates a situation where localities' Section 2 liability varies depending on the partisan affiliation of its voters. As we noted in the petition, and respondents do not dispute, a predominantly Democratic town otherwise *identical* to Hempstead would face no potential Section 2 liability under the decision below because minorities could elect their preferred Democratic candidates. Indeed, the lower court's finding that racial bloc voting exists absent any differential treatment of black candidates has the perverse result of immunizing predominantly Democratic jurisdictions from Section 2 liability even where white voters *do* discriminate against black candidates. As the Sixth Circuit has explained, "[w]hen white bloc voting is 'targeted' against black candidates, . . . [but] black voters nevertheless are able to elect many or most of their preferred candidates who are white, a court that refuses to consider candidate race will be unable to conclude that 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' " *Clarke*, 40 F.3d 807 at 812 (quoting *Gingles*, 478 U.S. at 51).

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without ever finding that minority electoral defeats were attributable to something other than normal, color-blind "partisan politics."

Thus, the lower courts which have followed the *Gingles* plurality's, and the Second Circuit's, view that the race of the candidate is irrelevant have overturned findings of racial bloc voting precisely because *white* candidates preferred by black voters have been successful. *See Lewis*, 99 F.3d at 615. Needless to say, Section 2 should not be converted into a vehicle for partisan favoritism, nor a statute which penalizes a color-blind electorate because they are predominantly Republican and simultaneously immunizes a racially-biased electorate because they are predominantly Democratic.

Finally, respondents complain that requiring a showing of racially-biased voting is an impermissible "inflexible rule." Opp. 23. But common sense and *Gingles* require that proving improper *voting* is, indeed, an inflexible prerequisite to establishing the illegality of an at-large *voting* system under the *Voting* Rights Act. If color-blind partisan voting is not "legally significant white bloc voting," or does not result in impermissible vote dilution, then the challenged electoral system here cannot "result" in discrimination on account of race. Consequently, there is no basis for invalidating that system on the basis of other slating or employment practices unrelated to the challenged at-large scheme and which will remain wholly unaffected by elimination of the at-large system. Respondents' obsessive focus on these tangential issues is a fairly transparent attempt to divert attention from the fact that the only flaw they can identify in the challenged *at-large system* is that it did not produce the proportional, partisan representation respondents desire.

3. In response to our contention that the district court exceeded the fundamental limits on its remedial authority by invalidating portions of the at-large system that complied with federal law, respondents simply repeat the mantra of the district court that the Board "proposed" a "two-district system" because of racial animus. But, again, the relevant inquiry is not the intent of the current Board, but the intent of the body that *enacted* the at-large system being struck down. As noted, the court below found that the Town had not adopted the at-large system in 1934 for racially discriminatory purposes and respondents do not suggest otherwise. This should have ended

the inquiry since the district court was without power to invalidate any aspect of the system that was enacted for a constitutionally legitimate purpose and that did not itself violate Section 2. Federal courts cannot evade these bedrock remedial limits, and invalidate local enactments concededly consistent with federal law, by simply asserting that an otherwise valid law is somehow "tainted" because it is now supported by alleged discriminators.

In any event, the lower court's finding of discriminatory purpose is internally contradictory and irrational. The black majority district created by the district court was obviously not intended to discriminate against black voters and it is just as "segregated" and "subject to retaliation" if it is surrounded by five overwhelmingly white single-member districts than if it is surrounded by one predominantly white district. There is thus no coherent basis for finding that the black majority district is perfectly permissible if adjacent to the single-member districts preferred by the district court, but somehow "racist" if adjacent to the multi-member district that has always been used in Hempstead and virtually every other town in New York.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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